No. 11693

In the United States Circuit Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

G. W. HUME COMPANY, RESPONDENT, AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. L., AND CALIFORNIA STATE COUNCIL OF CANNERY UNIONS, A. F. L., INTERVENORS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board for enforcement of its order issued against respondent G. W. Hume Company on October 31, 1946 (71 N. L. R. B. 533; R. 33–139), pursuant to Section 10 (c) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*)[1] Jurisdiction of this Court is based upon

[1] Relevant portions of the Act appear in the Appendix, *infra*, pp. 47–51. The Board's decision and order were issued prior to, and present no question affected by, the amendments to the National

Section 10 (e) of the Act. The unfair labor practices occurred at respondent's plant in Turlock, California, within this judicial circuit.[2]

STATEMENT OF THE CASE

A. The facts

The question presented by this case is whether the Board properly found that respondent (a) violated Section 8 (3) of the Act by discriminatorily discharging 29 of its employees for failure to maintain membership in the A. F. L.[3] at a time when respondent had a preferential hiring agreement with the A. F. L., but not a closed-shop contract, and (b) violated Section 8 (1) of the Act by thereafter, and while a representation question affecting its employees was pending before the Board, entering into a closed-shop contract [4] with the A. F. L., and by engag-

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Labor Relations Act by Section 101 of Title I of the Labor Management Relations Act, 1947, effective August 22, 1947 (Pub. L. No. 101, 80th Cong., 1st Sess., June 23, 1947).

[2] Respondent, a California corporation, is engaged at its plant at Turlock, California, in the canning and processing of fruits and vegetables (R. 7–8, 19). In the course of its business respondent causes more than 62 percent of its products, valued in excess of $1,900,000 annually, to be sold and shipped in interstate and foreign commerce (*ibid.*). The Board's jurisdiction is not contested (R. 192–193).

[3] The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. L., and the California State Council of Cannery Unions, A. F. L., and its constituent unions, one of which is Local 22382, are all hereinafter called A. F. L., except when distinction among them may be required by the matter under discussion (R. 194, 431, 472–473).

[4] While there is a distinction between the terms "closed-shop" and "union-shop," in the proceedings before the Board, the parties used the terms more or less interchangeably. The term "closed-shop" will be applied herein to either or both types of collective

ing in other acts of interference, restraint, and coercion. The relevant facts, as found by the Board, are not disputed.[5] Briefly, they are as follows:[6]

1. Respondent's relations with the A. F. L. from 1941 to 1946

Respondent is a member of an association of west coast packing concerns known as the California Processors & Growers, Inc., herein called the C. P. & G. (R. 51; 8–9). In the fall of 1940, Cannery Work-

bargaining agreements, unless a distinction is required by the subject under discussion. For a comparison of the various types of union security provisions in collective bargaining agreements, see, *Union Agreement Provisions*, United States Dept. of Labor, Bureau of Labor Statistics (U. S. Gov't Printing Office, 1942), Bulletin No. 686, pp. 19–27 and 1946 Supplement; Smith, *Collective Bargaining* (Prentice-Hall, 1946), pp. 60–68; Welty, *Labor Contract Clauses in the Automotive and Aviation Parts Manufacturing Industry* (Automotive and Aviation Mfg. Industry, Inc., 1945), Chap. IV; Prentice-Hall, *Union Contracts and Collective Bargaining Practices*, pars. 53, 129 ff; Bureau of National Affairs, *Collective Bargaining Negotiations and Contracts*, Secs. 87; 1 ff.

[5] Neither respondent nor the intervenors raised objections before the Board to the Trial Examiner's findings of fact. Respondent filed no exceptions at all to the Intermediate Report (R. 34). The intervenors filed exceptions but, in doing so, excepted only to the Trial Examiner's legal conclusions (R. 30–32). In oral argument before the Board both respondent and the intervenors took exception to the Trial Examiner's legal conclusions, but not to his findings of fact. Upon this state of the record the Trial Examiner's findings of fact, as adopted by the Board (R. 34–38, 50–111), are not open to question before the Court. *N. L. R. B.* v. *Cheney California Lumber Co.*, 327 U. S. 385, 388–389; *Marshall Field & Co.* v. *N. L. R. B.*, 318 U. S. 253, 255; *N. L. R. B.* v. *Kinner Motors, Inc.*, 154 F. 2d 1007 (C. C. A. 9); *N. L. R. B.* v. *Cutler*, 158 F. 2d 677 (C. C. A. 1).

[6] The Board adopted, with minor modifications (R. 34–35), the findings, conclusions and recommendations of the Trial Examiner (R. 49–126). In the following résumé of the facts, references to the Board's findings precede the semicolon, and references to the supporting evidence follow the semicolon.

ers Union Local 22382, began to organize the plants of respondent and other C. P. & G. members (R. 50–51; 431, 471–472). And since 1940 respondent has recognized Local 22382 as the exclusive bargaining representative of its employees (R. 51–52; 197, 428, 615).

On or about June 10, 1941, a collective bargaining agreement, herein referred to as the Master Agreement,[7] was executed between the C. P. & G., on behalf of its members, and the California State Council of Cannery Unions, as the representative of the various A. F. L. cannery workers' unions in the state (R. 51; 196–203, 277–278). On or about July 3, 1941, pursuant to a provision of this contract, respondent executed an agreement with Local 22382, adopting the Master Agreement as applied to its operations (R. 51; 506–509). The Master Agreement was subsequently amended in minor respects in January 1942 (R. 51; 509–512), and again in July 1943 (R. 51; 512–514, 615). As last amended, it was to run until March 1, 1945, and thereafter from year to year, subject to modification or termination upon specified notice by any party thereto (R. 51–52; 637–638). Pursuant to this provision it was automatically renewed in 1945, to run until March 1, 1946 (R. 52; 197). This agreement, as will be shown later (*infra,* pp. 23–44), was not a closed-shop contract but was merely a preferential hiring contract.[8]

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[7] Also referred to in the record as the "Green Book Agreement" (R. 198, 277).

[8] Unlike a closed-shop contract, a preferential hiring agreement does not fix union membership as a condition of either initial or continued employment. A preferential hiring agreement provides

Until early in 1945, Local 22382 was not affiliated with any of the various A. F. L. international unions which are composed of numerous affiliated local unions, but was what is known as a Federal Local Union, affiliated directly with the A. F. L. itself (R. 50–51, 60–61; 222, 287). Sometime in June 1945, however, while the plant was not in production, A. F. L. representatives discussed with respondent's "regular" employees,[9] all of whom apparently were members of Local 22382, a proposed transfer of jurisdiction over Local 22382 from the A. F. L. itself to the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (R. 59–60; 228–230, 272–274, 284–285). Although the proposed change was vigorously opposed by respondent's employees (R. 60; 229–230, 240–242, 272–274, 287), it apparently was effectuated soon thereafter (R. 61; 284, 524–527).[10] Shortly after the proposed transfer of jurisdiction over Local 22382 to the Teamsters was

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merely that the employer, in the *hiring* of new employees, will give *preference* to available and qualified members of the union (*supra*, pp. 2–3, n. 4). The Master Agreement was strictly a preferential hiring agreement (*infra*, pp. 23–44).

[9] Respondent's operations fluctuate widely with the packing seasons. Between seasons when the plant is not in production respondent retains only 20 or 30 workers. These are known as permanent or "regular" employees. During the packing seasons a large number of "seasonal" workers are hired to augment the small staff of "regular" employees (R. 59, 63, 107–108; 229, 231–232, 432–433).

[10] As the Board observed (R. 61, n. 12), the record does not clearly reveal the exact time and manner in which the Teamsters "became injected into the picture" as the affiliate of Local 22382. It is clear, however, as the Board found (*ibid.*), that "In August, 1945, * * * [the] Teamsters appear to have taken control

announced, all of respondent's "regular" employees revoked their voluntary authorizations to the Company to deduct union dues and assessments from their pay (R. 60; 229–231). Such deductions had been made up to that time in accordance with a check-off agreement between respondent and Local 22382 (R. 55–57; 216–218, 222–224, 279).[11] After receipt of the revocations, respondent no longer deducted dues for Local 22382 from the pay of its "regular" employees, nor did these employees pay dues to any other affiliate of the A. F. L. in 1945 (R. 60; 231, 276, 279–281, 355, 364, 366, 393–395, 403–404).

2. The C. I. O. organizational campaign; subsequent A. F. L. demands that respondent give the Master Agreement the force and effect of a closed-shop contract

During the summer of 1945 the C. I. O.[12] began an organizing campaign among the employees of respondent and of numerous other California packing concerns both members and non-members of the C. P. & G. (R. 63; 327–328, 348–349, 384, 392, 403–404, 428–

for all practical purposes and to be the group with whom Hume was dealing" (R. 232–236).

[11] The original check-off agreement between respondent and Local 22382, which was executed in August 1944 and was not part of the Master Agreement, provided for compulsory check off of union dues and assessments from the wages of "each employee * * * covered by this agreement" (R. 55–57; 216–218). In June 1945, however, this check off agreement was superseded by an amendment to the Master Agreement which provided that union charges be checked-off against the wages of union members only upon the voluntary written authorization of the individual employee, and that such authorization was revocable at the will of the employee (R. 58–59; 408, 410).

[12] Food, Tobacco, Agricultural and Allied Workers Union of America, affiliated with the C. I. O., herein called C. I. O.

429, 431–432, 477). After its drive had been under way for several weeks, the C. I. O. filed with the Board petitions seeking certification as bargaining representative of the employees in many of these plants, including respondent's (R. 63–64; 431–432, 569–570). After hearings were held on these petitions, the Board, in October 1945, directed employee elections at the plants involved (R. 64; 568–594, *infra,* pp. 17–18). The results were inconclusive and all of the elections were subsequently vacated by order of the Board (R. 64–65; 595–610). This aspect of the case is discussed hereinafter (*infra,* pp. 18–21, 45–46).

(a) Attempts by respondent and the A. F. L. to induce employees to join the A. F. L.

As we have noted, and shall discuss more fully below (*infra,* pp. 23–44), the Master Agreement which had been in effect between respondent and the A. F. L. since 1941 was nothing more than a preferential hiring contract. Concurrently with the initiation of the C. I. O. campaign, however, the A. F. L. began a determined drive to compel respondent to give the agreement the force and effect of a closed-shop contract, and thereby to compel all of respondent's employees to maintain membership in the A. F. L. Respondent's response to this pressure from the A. F. L. varied from time to time and alternated between acquiescence and adamant refusal.

Thus, early in August 1945, as its plant was about to open for the peach canning season, respondent joined the A. F. L. in a move designed to induce all the "regular" employees who had dropped out of the union the preceding June to renew their memberships.

At this time respondent's plant foreman ordered the "regular" employees to assemble for a meeting which was attended by Plant Superintendent Fordham (R. 60–61; 538–539), Assistant Superintendent Gallardo (R. 61; 471), F. S. Clough, a field representative of the C. P. & G. (R. 61; 233, 468–469), and several representatives of the Teamsters (R. 60–61; 232). In a speech to the employees, Clough urged that they "clear through the Teamsters * * * to keep the plant operating in a peaceful manner" (R. 61; 234).[13] His suggestion met with considerable opposition, however, by those "regular" employees whose employment had started after the original execution of the Master Agreement. These employees had cleared with Local 22382 when first hired as "new employees" (R. 62; 234–235), and since then, together with "seasonal" employees on the seniority list, had not been required to make further clearance for succeeding seasons either under the Master Agreement (R. 62; 615–648) or by custom (R. 62; 234–235).[14] Many of them felt that clearing through the Teamsters again would necessitate executing dues check-off authorizations for that organization (R. 61; 235–236). When Clough assured them that this would not be the case, the "regular" employees at the meeting signed cards requesting clearance from the Teamsters (*ibid.*).

[13] To "clear through the Teamsters" was a phrase used to describe the practice of requiring a job applicant to get a "clearance" card from that union certifying that he was a member in good standing and eligible to be hired (R. 224–225, 234).

[14] The Master Agreement provided for the maintenance of a seniority list at each plant (R. 626–632), to be composed (a) of "regular" employees, i. e., "Those who have worked in a given

And, subsequently, the "seasonal" employees followed suit (R. 62–63; 326–328, 346–348, 403–404).

In spite of Clough's contrary representation, however, "seasonal" employees reporting to the A. F. L. for clearance slips, as the August 1945 canning season commenced, were required to execute dues check-off authorizations before the union would give them clearance (R. 62–63; 236–237, 326–328, 346–348, 403–404). Since many of these "seasonal" employees had worked for respondent for several years and were, as the Board found (R. 34, 87), on the seniority list, this requirement brought forth an immediate protest to Superintendent Fordham that they were being "double-crossed" (R. 237). Their complaint, however, went unheeded (R. 62; 237–238, 431–433). And despite the fact that the Master Agreement gave the A. F. L. no warrant to insist upon check-off authorizations from any employee and, indeed, afforded respondent no grounds for requiring union clearance by any except "new" employees (*infra,* pp. 26–28), respondent refused work to any employee, including "seasonal" employees on the seniority list, who had not cleared with the union (R. 62; 326–328, 346–348).

Notwithstanding the coercive tactics of the A. F. L., to which respondent gave its support, some 150 of the

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plant at least forty (40) weeks out of the fifty-two (52) weeks during the preceding calendar year" (R. 628), and (b) of "seasonal" employees, i. e., "those other than regular employees, who worked in a given plant at least sixty percent (60%) of the total number of operating days of said plant during the previous season" (*ibid.*). "New" employees were defined as those who were not on the seniority list (R. 618).

400 "seasonal" employees taken on for the peach canning season revoked their check-off authorizations immediately after being hired (R. 63; 238–239, 327, 346, 388–389, 393–394, 403–404, 432–433). By various means the A. F. L. sought to persuade these employees to cancel their revocations, but its efforts were unsuccessful (R. 65; 433–434). Although respondent had given tacit encouragement to the A. F. L. practice of extracting check-off authorizations from job applicants, respondent honored the revocations of the authorizations after their receipt and deducted no dues from the pay of the employees who signed them (*ibid.*).

(b) The discriminatory discharges

(1) *The discharges of November 20–21, 1945.*—In the fall of 1945, the A. F. L. renewed its efforts to induce respondent to give the preferential hiring section of the Master Agreement the force and effect of a closed-shop provision. Thus, early in November, at the start of the fall spinach canning season, it demanded that respondent "lay off or fail to employ all [employees] who would not clear" through the A. F. L. (R. 65; 433–434). This construction of the agreement by the A. F. L., however, was promptly rejected by respondent after President Hume had conferred with the C. P. & G. and had been advised that the Master Agreement would not permit the discharge of any employees for their refusal to join the A. F. L. (R. 65–66; 433–434, 464–465).

Shortly after respondent rejected this demand the A. F. L. adopted another tactic. On November 19,

it cut off all spinach deliveries to the cannery and informed respondent that no further deliveries would be made "until certain employees were discharged" (R. 66; 435). The following morning it placed a picket line around the plant and refused to allow any trucks to enter (R. 66; 436, 478). On that same day the A. F. L. gave to President Hume a list of 28 employees whose discharge it demanded on the ground that they had been suspended from the A. F. L. for non-payment of dues (R. 66; 251–252, 479–481). Upon receipt of this ultimatum, respondent receded from its previous interpretation of the Master Agreement and acquiesced in the A. F. L. demand (R. 66–67; 480–482). President Hume immediately assembled the "regular" employees, explained the A. F. L. demand to them, had the list read aloud, and told them that those whose names had been read were being laid off until further notice (R. 66–67; 247–254, 348, 380–381, 389–390, 400–401, 403–404, 491–492, 500–501).[15] Following this action the A. F. L. lifted the picket line and allowed spinach to be delivered to the cannery (R. 66–67; 456, 482–483).

[15] The "regulars" who were thus laid off included, as the Board found (R. 34, 66, 69, 73, 117–118), the following 18 employees: A. E. Berry, Ernest G. Bishop, Vidor Bjorkund, Jasper J. Bobb, Harold Dillard, William J. Ely, Clyde Faddis, H. F. Frazier, Harlie Frischknecht, (erroneously listed as "Harlie Cruikshank," see, *infra*, pp 13–15), Irwin C. Heagle, Oscar Johnson, T. Boyd McKamey, Archie Miller, A. E. Moore, Harry E. Pierson, Abe Thiessen, Neal Watts, and R. B. White (R. 403–404, 500–501). While Moore's name was not on the written list given Hume by the A. F. L., it had been mentioned to Hume orally by the A. F. L. as one of the employees whose discharge was demanded (R. 67, n. 17; 492). Aside from Clifford Luther, who was discharged

On the morning of November 21, however, the A. F. L. blocked the entrances to the cannery and, with the exception of ex-servicemen, permitted the entrance of no male employee who was unable to exhibit a current clearance card from the A. F. L. (R. 69; 255–256, 384–386, 391–392). Those who were barred included not only the group of "regulars" who had been laid off the previous day, but also some "seasonal" employees who were on the seniority list (R. 69; 255–256, 346, 348–349, 391–392, 403–404, 437–438). When the excluded employees sought to force the picket line a scuffle ensued and Factory Superintendent Fordham was called (*ibid.*). Meanwhile, inside the cannery, Assistant Superintendent Gallardo canvassed those employees who had been allowed to pass through the picket line, to determine whether they were members of the A. F. L. in good standing (R. 69; 333–334, 340–344). Those who were not were ordered out of the plant after being told they could not work until they had been cleared by the A. F. L. (*ibid.*). As these employees left the plant they joined the group which had been stopped at the entrance and which Superintendent Fordham was addressing at that time (R. 69; 333–334, 340–344, 346–349, 391–392, 401, 425–426). Fordham told the entire group that unless they paid up their dues in the A. F. L. they would have to get off respondent's premises (*ibid.*). Pursuant to Fordham's orders, all those present, both the "regular" employees mentioned above (*supra,*

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the following day (see n. 16, p. 13, *infra*,) the record does not show whether the respondent discharged the other 9 employees on the A. F. L.'s list.

pp. 11–12), and a number of "seasonal" workers on the seniority list, left respondent's premises (*ibid.*).[16]

(2) *The discharge of Employees Frischkneckt and McVay.*—The facts in connection with the discharge of Employee Harlie Frischkneckt actually differ in no material way from those surrounding the discharge of the other employees discussed above. Through what appears to have been an oversight, the A. F. L. omitted Frischkneckt's name from the letter in which it demanded the discharge of all the employees on the warehouse crew who had been suspended from the union for non-payment of dues (R. 73; 251–252, 492, *supra,* p. 11). Instead of the name "Harlie Frischkneckt" the A. F. L. listed a "Harlie Cruikshank," although there was no person of that name employed by respondent (R. 71; 250–253). It is clear, however, as the Board found (R. 34, 70–73), that the A. F. L. intended that Frischkneckt be included on this list and that the respondent did, in fact, lay him off on November 20.

Frischkneckt's position was identical with that of all the other "regular" employees on the list. Although he had joined the A. F. L. when first hired (R. 71; 354), he had, in August 1945, like his fellow workmen in the warehouse, revoked a check-off author-

[16] The seasonal workers who were thus discharged included, as the Board found (R. 34, 70, 116), the following ten employees: Clemmie Robinson, Monroe Robinson, Thomas L. Broll, Ruth Waite, Agnes Hopkins, Myrtle Brown, Genevieve Alsup, Marguerite Watts, Clifford C. Luther, and R. E. Rearick (R. 333–334, 340–344, 346–349, 425–426). With the exception of Clifford Luther, none of these employees was on the list of those whose discharge the A. F. L. demanded (R. 251–252).

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ization to the A. F. L., and from that time forward paid no dues to the A. F. L. (R. 71–73; 354–355, 360). Consequently, when President Hume, on November 20, assembled the warehousemen and read off the names of those whose discharge the A. F. L. had requested, Frischkneckt joined his fellow employees as they left the cannery (R. 71–72; 356–357; *supra,* pp. 11–12). The following day Frischkneckt was with the group which sought to go through the A. F. L. picket line at the plant and to which Superintendent Fordham offered the choice of paying up their A. F. L. dues or leaving the premises (R. 72–73; 359–360).

On November 26, Frischkneckt returned to the plant (R. 72–73; 356, 358). After the plant manager made a cursory check of the A. F. L. list of proscribed employees and could not find Frischkneckt's name on it, he let Frischkneckt go to work (R. 72–73; 356). Frischkneckt was at work only a short while when an A. F. L. representative informed him that he would have to pay up his dues and clear himself with the A. F. L. if he wanted to continue working in the plant (R. 72–73; 357–358). Frischkneckt thereupon left the plant (*ibid.*). The union representative's assertion was verified by Frischkneckt's supervisor, Orville Hopkins, who later told him that in order to work at the plant he must "sign up with the A. F. L. (R. 73; 367–368).

These facts support the Board's finding that Frischkneckt's termination of employment actually took place on November 20, 1945 (R. 34, 73). Being one of those delinquent in dues to the A. F. L., he had every reason to believe that respondent's announce-

ment of the discharges applied to him, as well as to the rest of the "regular" employees. And, indeed, respondent believed the same; for President Hume testified that on November 20 he had discharged all the warehouse employees because "it was assumed that the whole warehouse [crew] was on the [A. F. L.] list" (R. 492).

The only other discharge involved in this case, that of Clarence McVay, a "seasonal" employee, took place on December 7, 1945 (R. 74, 371–376). Other than the difference in point of time, the facts with respect to McVay's discharge are substantially the same as those surrounding the others. McVay had revoked a dues check-off authorization that he had signed on first reporting for work and had never paid any dues to the A. F. L. (R. 74; 371–372). On December 7, an A. F. L. representative approached him while at work and requested him, in the presence of his foreman and President Hume, to pay up his union dues (R. 74; 371–375). President Hume advised McVay that he "might just as well sign up" (R. 74; 374). McVay, however, refused and was immediately dismissed (R. 74; 373–375). On these facts the Board's finding that McVay was discharged on that day for failure to maintain his membership in the A. F. L. is not open to dispute (R. 34, 74; 115–116).

(c) The subsequent dispute between respondent and the A. F. L. as to whether the Master Agreement requires maintenance of a closed-shop

Early in February 1946, respondent rehired a number of the employees it had discriminatorily discharged the previous November, allegedly in accordance with

the Master Agreement, for failing to maintain membership in the A. F. L. (R. 76; 449, 261, 263–264, 334–335, 393–394). Although, at the time of the rehiring, respondent considered the Master Agreement still in effect, these employees were rehired despite the fact that they had not paid union dues since June 1945 and, hence, were not members in good standing (R. 76; 263–264, 276, 334–335, 362–364, 393). Respondent's reversal of position with respect to the requirements of the Master Agreement provoked an immediate protest from the A. F. L. that respondent was violating the Agreement (R. 77–79; 448–451). As a result of the A. F. L.'s complaint a union-management grievance committee, known as the Central Adjustment Board, was called upon to settle the dispute (*ibid.*). The Central Adjustment Board, composed of an equal number of representatives of the C. P. & G. and of the A. F. L., was established pursuant to the Master Agreement to adjust grievances which could not be satisfactorily adjusted by the individual companies (R. 77; 622–625). The contract provided that its decisions be final and binding upon the parties concerned except in the event of a deadlock, in which case a mutually satisfactory outside person could be called upon to make the decision (*ibid.*).

On February 8, 1946, the Central Adjustment Board met to hear the A. F. L. complaint (R. 77; 448–451). The question for decision, as it was framed for a final vote by that board, was as follows (*ibid*):

> Whether the G. W. Hume Co. * * * in accordance with the terms of the collective bargaining agreement between [the C. P. & G. and

> A. F. L.], and/or the past practices of the union and the plant management, is required to maintain a union shop.

A secret ballot resulted in a four-to-four tie vote, whereupon the parties agreed that the United States Conciliation Service be called upon to name an arbitrator (R. 78; 445–446, 448–451). On April 3, 1946, however, the individual whom the Conciliation Service so designated declined to serve (R. 79; 452–454). At the time of the hearing before the Trial Examiner no other arbitrator had been appointed and no further action had been taken by the Central Adjustment Board (R. 79; 206, 555).

3. The representation proceeding and respondent's execution of a closed-shop contract with the A. F. L. during its pendency

As we have seen (*supra,* pp. 6–7), in July 1945, the C. I. O. filed a petition with the Board alleging that a question affecting commerce had arisen concerning the representation of a number of west coast packing plants, including respondent's plant (R. 63–64; 569–570). During July, August, and September, 1945, pursuant to appropriate orders of the Board, consolidated hearings, in which the various employers involved were represented, were held on these petitions in a proceeding known as the *Matter of Bercut-Richards Packing Co. et al.* (R. 63–64; 568–594), 64 N. L. R. B. 133. At the hearing on the petitions, the A. F. L. contended that the Master Agreement constituted a bar to the representation proceeding and urged that the Board dismiss the petitions (64 N. L. R. B. 133, 135).

On October 5, 1945, the Board issued a telegraphic decision and order directing an election in the consolidated cases (R. 64; 570). The Board found that since the Master Agreement was to expire within a short time, it did not constitute a bar to the representation proceeding which was designed to determine the employees' representatives for the period succeeding the termination of the Master Agreement (R. 571–573; 64 N. L. R. B. 133, 135).[17] On October 17, 1945, pursuant to the Board's order, the Regional Director conducted an election among the employees in the plants involved (R. 64; 243–244).[18]

The A. F. L. filed objections to all the elections held pursuant to the *Bercut-Richards* decision, including the election held among the group including respondent's employees (R. 64; 596–607). On January 16, 1946, the Regional Director issued his Report on Objections to the election (R. 80; 596). On February 15, 1946, after a hearing on the objections, the Board issued a Supplemental Decision and Order in the consolidated cases vacating and setting aside all the elec-

[17] The Board subsequently, on October 12, 1945, issued a formal Decision, Direction of Election, and Order consonant with the determination and findings made in the telegraphic decision. 64 N. L. R. B. 133.

[18] The tally of the votes at the elections of the employees of the member companies of the C. P. & G. showed (R. 65; 611):

Approximate number of eligible voters	23,545
Valid votes counted	10,968
Votes cast for California State Council of Cannery Unions, A. F. L.	4,701
Votes cast for F. T. A.-C. I. O.	6,067
Votes cast for Cannery and Food Process Workers Council of the Pacific Coast, Independent	110
Votes cast against participating labor organizations	90
Challenged ballots	1,291
Void ballots	248

tions as inconclusive, principally on the ground that they were not "attended by such procedural safeguards or certainty concerning eligibility as to constitute a proper foundation for a Board certification" (R. 80–83; 604, 595–614). Since, by reason of the seasonal nature of the canning industry, it would be several months before the spring season reached its peak (R. 82; 605), the Board stated that new elections would be held as early in the 1946 season as there was substantial employment, or even sooner, if adequate voting lists could be prepared (*ibid.*). The Board then declared (R. 81–82; 605–606):

> While we view the record as requiring this result we reach it with considerable reluctance because it means that the employees will have no bargaining representative to negotiate an exclusive collective agreement to cover the coming season, until a new election can be held which may result in one of the rival unions being certified. The current AFL contract will expire on March 1 and since the legal effect of the foregoing determination is to keep the question of representation pending before the Board, none of the unions is entitled to an exclusive status as the bargaining agent, after that date. In accordance with well-established principles,[14] the employers may not, pending a new election, give preferential treatment to any of the labor organizations involved, although they may recognize each one as a representative of its members. In this state of the record, no legal effect may be given the closed-

[14] See *Matter of Midwest Piping & Supply Co., Inc.*, 63 N. L. R. B. No. 163; see also *Matter of Ken-Rad Tube & Lamp Corp.*, 62 N. L. R. B. 21.

shop provision contained in the current collective agreements after their expiration date,[15] the inclusion of any such provision in any new agreements, or action pursuant thereto, would clearly be contrary to the proviso in subsection 8 (3). Nothing in our decision, however, should be construed as requiring any change in the substantive conditions now existing by virtue of the foregoing agreements.

[15] Moreover, no requests for discharges resulting from activity in the election are justified even under the present agreement. See *Matter of Rutland Court Owners*, 44 N. L. R. B. 587, 46 N. L. R. B. 1040.

Despite the fact that, shortly after its issuance, respondent received a copy of the Board's Supplemental Decision admonishing all employers affected by the *Bercut-Richards* decision not to renew, or effect, any exclusive recognition or closed-shop contracts while the representation question was pending (R. 83: 188–189, 442–443), respondent, on March 25, 1946, while the representation question was still pending,[19] entered into a closed-shop contract with the A. F. L. (R. 83–84; 219–220, 487–489). Specifically, the contract, of indefinite duration, required that all employees become and remain members of the A. F. L., or be discharged within 36 hours after notice to respondent of their failure to comply, and that, in the hiring of new employees, preference be given unem-

[19] The representation question in the *Bercut-Richards* case is still unsettled. In accordance with its Supplemental Decision therein, the Board conducted a new election in the affected plants in August and September 1946. Objections to this election were filed, subsequently, by the C. I. O. On the basis of these objections, the Board has conducted an extensive investigation of the election but, to date, has not arrived at a decision as to the merits of the objections.

ployed members of the A. F. L. (R. 83–84; 219–220).[19(a)] Admittedly, respondent has enforced and given effect to this agreement since its consummation (R. 489–490). Moreover, it is admitted that after March 1, 1946, respondent permitted A. F. L. representatives free access to the cannery for the purposes of collecting dues and soliciting memberships, while at the same time denying like privileges to representatives of the C. I. O. (R. 111; 264–266; 424–425).

B. The Board's decision and order

The Board found, on the facts related above, that respondent's discharge of the 29 employees for failure to maintain membership in the A. F. L. was not protected by the Master Agreement under the proviso to Section 8 (3) of the Act, and was, therefore, a violation of Section 8 (3) and (1) of the Act (R. 34, 36–37, 98). The Board further found (R. 34, 111), that respondent had, in violation of Section 8 (1) of the Act, interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act, by urging its employees to become and remain members in good standing in the A. F. L., by requiring, as a condition of employment, the employees on the seniority list to obtain new clearance slips from the A. F. L., by permitting representatives of the A. F. L. access to its cannery after March 1, 1946, while denying like privileges to representatives of the C. I. O. (R. 34, 111), and by granting on March 25, 1946, exclusive recognition and a closed-

[19(a)] Respondent executed this closed-shop contract on the very first day of the spinach canning season, without requiring proof of majority from the A. F. L. (R. 484; 487–489).

shop contract to the A. F. L. at a time when respondent knew that a representation question was pending before the Board (R. 35, 98–111).

The Board's order requires respondent to cease and desist from its unfair labor practices, to reinstate with back pay those of the 29 employees whom it discriminatorily discharged and who had not been previously rehired, to make whole with back pay those who had been rehired, to cease giving effect to the closed-shop contract, to withhold exclusive recognition from the A. F. L. unless and until the A. F. L. shall have been certified by the Board as the exclusive representative of the employees, and to post appropriate notices (R. 38–45).[20]

SUMMARY OF ARGUMENT

I. The Board properly concluded that the discriminatory discharges, allegedly made in accordance with the Master Agreement, were not protected under the proviso to Section 8 (3), but were in violation of Section 8 (3) of the Act.

II. The Board properly concluded that respondent violated Section 8 (1) of the Act:

(a) By rendering assistance to the A. F. L.

(b) By entering into a closed-shop contract with the A. F. L. when a representation question affecting its employees was pending before the Board.

[20] The Board, like the Trial Examiner, dismissed those allegations of the complaint which averred that the California Processors and Growers, Inc., violated the Act (R. 34). The Board also dismissed without prejudice the allegations of the complaint insofar as it alleged that respondent had discriminatorily discharged one John M. Smith in violation of Section 8 (3) and (1) of the Act (*ibid.*).

ARGUMENT

Point I

The Board properly concluded that the discriminatory discharges, allegedly made in accordance with the Master Agreement, were not protected under the proviso to Section 8 (3), but were in violation of Section 8 (3) of the Act

A. The Master Agreement affords respondent no protection for the discrimination engaged in

Section 8 (3) of the Act, apart from the proviso thereto, makes it an unfair labor practice for an employer "By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *." The proviso to Section 8 (3) allows an exception to this broad proscription by permitting an employer, within certain limits, to make "an agreement with a labor organization * * * to require as a condition of employment membership therein * * *."[21] There can be no question, therefore, but that if the Master Agreement, in alleged accordance with which respondent discharged 29 of its employees because they failed to

[21] The proviso to Section 8 (3) reads in full as follows: "*Provided*, That nothing in this Act or in the National Industrial Recovery Act (U. S. C. Supp. VII, Title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a) in the appropriate collective bargaining unit covered by such agreement when made."

maintain membership in the A. F. L. (*supra,* pp. 10–15), did not condition their employment upon such membership, the discharges constituted an unlawful discrimination in violation of Section 8 (3) of the Act. *N. L. R. B.* v. *Electric Vacuum Cleaner Co., Inc.,* 315 U. S. 685, 692–695; *N. L. R. B.* v. *Waterman Steamship Corporation,* 309 U. S. 206, 211–213; *N. L. R. B.* v. *Mason Mfg. Co.,* 126 F. 2d 810, 813–814 (C. C. A. 9); *South Atlantic Steamship Co.* v. *N. L. R. B.,* 116 F. 2d 480, 482 (C. C. A. 5), certiorari denied, 313 U. S. 582.

Thus, the single question presented by this phase of the case is whether the Master Agreement was a closed-shop contract, i. e., whether, in the language of the proviso to Section 8 (3) of the Act, it *required* of the employees discriminated against, membership in the A. F. L. "as a condition of employment." The language of the Master Agreement, we submit, not only supports the Board's finding that "nothing" therein "required the employees in question to maintain their union membership as a condition of continued employment with respondent" (R. 36), but permits no other construction.

1. ***The terms of the Master Agreement did not condition employment upon union membership***

The portions of the Master Agreement (R. 615–648) which deal with the matters of hiring practices and the employer's obligations in connection with the union membership status of his employees are as follows (R. 617–618):

SECTION 3. PREFERENCE OF EMPLOYMENT AND HIRING PRACTICES.

(a) It is recognized that the refusal of Union members to work with non-union employees who are within the jurisdiction of the local union shall not constitute a violation of this agreement, provided, however, that before any strike action, job action, or other direct action is taken on this account, the local Union will submit the matter for adjustment as provided in Section 8 hereof.[22] In order to aid in the prompt adjustment of such matters, the Union shall furnish its members with a clearance card, dues book or other evidence of paid-up membership, and *when employees who are on the seniority lists, as defined in Section 9 hereof,*[23]

[22] Section 8 establishes the grievance procedure and provides for the ultimate disposition of grievance questions by arbitration if necessary (R. 622–626).

[23] Section 9 relates to the establishment of a seniority roster and provides, in part, as follows (R. 626–628):

"(b) All jobs shall be filled and rehiring shall be from the regular list in the order of seniority, and thereafter all vacancies in positions of regular and seasonal employment shall be filled from the seasonal list in the same order * * *. Similarly, lay-offs for lack of work shall be made in the reverse order of seniority * * *.

"In rehiring new employees, the procedure and preferences provided in Section 3 hereof shall be followed * * *.

* * * * *

"(d) In each plant employees shall be divided into two (2) groups as follows: Regular employees and seasonal employees, all to be listed on one seniority roster for said plant.

"(e) Regular employees are those who have worked in a given plant at least forty (40) weeks out of the fifty-two (52) weeks during the preceding calendar year.

"Seasonal employees are those other than regular employees who worked in a given plant at least sixty (60) percent of the total number of operating days of said plant during the previous season."

are called to work, the Employer will request that such evidence be presented by those who have it, and will keep a record, which will be available to the Union, of all employees who do not present such evidence. Similarly the Union will from time to time, when such information is available, notify the Employer of the names of delinquent or suspended members, or other non-union employees, according to Union records.

The Employer shall be the sole judge of the qualifications of all its employees, subject to appeal as provided in Section 8 hereof, but in the selection of *new employees* the Employer will give *preference* of employment *to unemployed members of the local union,* provided they have the necessary qualifications and are available when new employees are to be hired. "New employees," for the purpose of this agreement, are defined to be persons who are not on the seniority list of the hiring plant, as defined in Section 9 hereof, even though they may have been employed previously by said plant. As a basis for preferential consideration as new employees as aforesaid, unemployed members of the local union shall be required to present a clearance card from the local union evidencing the fact of their paid-up membership. [If such union members are not available for such employment, the Employer may hire any person not a member of the Union provided that such person will be required to file an application for membership in the local union before being put to work. Upon filing such application he

> shall receive from the Union a written statement that he has made such application, which statement shall be taken up by the Employer and returned to the Union when the applicant is put to work. It is further understood that such person must become a member of the local union within ten (10) days after his employment, and that the local union will not reasonably refuse to accept such person as a member.] [Italics added.][24]

Subsection (b) of Section 3 of the Agreement provides for the mechanics of carrying out the foregoing and requires the contracting local union to have a representative available in the plant to receive the applications from new employees (R. 619–622). In this subsection "the local union agrees to assume responsibility for completing the matter of subsequent affiliation by new workers as members of the Union" (R. 622).

Section 3 of the Agreement, as its title suggests, focuses upon the proposition that the employer will give *preference* to union members in hiring *new* employees. Nothing in the Agreement so much as suggests that *old* employees, that is, employees on the seniority list,[25] are required, as a condition of contin-

[24] The matter in brackets is a modification made on or about July 10, 1943, due to the then existing manpower shortage, to permit the canneries to hire during the 1943 canning season "emergency workers" who, however, had to file an application for membership in the local union of the Council or obtain an "emergency card" therefrom before being allowed to work (R. 618, 640–646).

[25] As shown above (*supra*, pp. 9–13), all of the employees whose discriminatory discharges are involved herein were old employees on the seniority list.

ued employment, either to join the A. F. L. or to maintain their memberships if they had joined in the past. The only provision in the Agreement requiring union membership of *any* employee is the second paragraph of Section 3 (a) which provides (1) that unemployed members of a local must show a clearance card "evidencing the fact of their paid-up membership" before they are eligible for "preferential consideration as new employees" (*supra,* p. 26), and (2) that a new non-union member employee, hired to fill a job for which a union member was not available, "must become a member of the local union within ten (10) days after his employment" (*ibid.*). Even these provisions affecting new employees, however, do not require such employees to *maintain* their union membership in the future as a condition of continued employment.

The provision in section 3 (a) of the Agreement that a refusal on the part of union members "to work with non-union employees * * * shall not constitute a violation of this agreement," is the only portion of this section of the Agreement applicable to employees on the seniority list (*infra,* p. 29).[26] And there is absolutely no indication therein that such employees are required to join, or maintain membership in, the union as a condition of employment. The provision does nothing more than preserve to union members the right to strike in protest against being required to work with non-union employees, and to do

[26] If the Master Agreement were truly a closed-shop contract this provision clearly would be meaningless, for no employees who were not members of the union would be permitted to work in the plant.

so without having such strike action constitute a violation of the Master Agreement. And even this right is qualified by the proviso that any dispute in this connection must be submitted for adjustment through the contractual grievance procedure, before any direct action may be taken by the union or its members. "In order to aid in the prompt adjustment of such matters," the Agreement provides that the union will furnish all its members with a clearance card "or other evidence of paid-up membership," and that the employer, upon recalling to work employees "who are on the seniority lists," will report to the union all such employees who do not present evidence of union clearance. Presumably as a cross-check to keep the records straight, the Agreement provides also that the union will, in turn, inform the employer of delinquent or suspended members.

This is a far cry from an agreement providing for the maintenance of a closed-shop. Whatever else these terms of the Agreement may stand for, they certainly do not provide that employees on the seniority list must maintain membership in the union or else be subject to discharge from their jobs. Indeed, neither respondent nor the A. F. L. contend to the contrary. Respondent, in fact, has conceded that the Board's interpretation of the language of the Agreement is correct. For, in January 1946, in oral argument before the Board in the *Bercut-Richards* case (R. 214), which, as we have seen (*supra,* pp. 18–20), also involved the Master Agreement, respondent's

counsel[27] declared that the language of "the contract itself does not expressly require that we discharge people for not maintaining good standing in the union." Respondent's counsel affirmed this appraisal of the terms of the Master Agreement in the hearing before the Trial Examiner in the instant case (R. 198–200). While the A. F. L. has made no such forthright concession, it has, at no point in the instant case, urged before the Board that the language of the Agreement conditioned continued employment of employees on the seniority list upon membership in the A. F. L. And even in its relations with the various employers who were parties to the Master Agreement, the A. F. L., according to the secretary-treasurer of the local at the Hume plant at that time (R. 96; 285–286), apparently insisted that it was a closed-shop agreement, only "when they could get away with it" (R. 96; 298–300).

The fact that the terms of the Master Agreement do not make continued employment of employees on the seniority list contingent upon membership in the A. F. L. is, we submit, decisive of the propriety of the Board's finding that respondent violated Section 8 (3) of the Act when it discharged the 29 employees on the seniority list because they failed to maintain membership in the A. F. L.

The proviso to Section 8 (3) of the Act, as we have noted, permits such discrimination against employees only where the employer and the union properly representing his employees have an agreement which makes union membership "a condition of employment." *Matter of Iron Fireman Manufacturing Com-*

[27] Mr. John Paul St. Sure, who is also respondent's counsel in the instant case (R. 163).

pany, 69 N. L. R. B. 19, 20–21. The proviso is, in short, an exception to the statute's broad proscription of employer discrimination against employees because of their union affiliations or activity and, as such, is to be narrowly and strictly construed.[28] As the Supreme Court has declared, "These words of the exception must have been carefully chosen to express the precise nature and limits of permissible employer activity in union organization" (*N. L. R. B.* v. *Electric Vacuum Cleaner Co., Inc.,* 315 U. S. 685, 695). The Congressional purpose in including the proviso in the Act was not to "favor," "facilitate," or give "special legal sanctions" to closed-shop arrangements between unions and employers (Report of the Senate Committee on Education and Labor, 74th Cong., 1st Sess., S. Rep. No. 573, pp. 11–12).[29] The purpose was simply to

[28] The cases abound which lay down the fundamental principle that such a proviso must be strictly construed and that one seeking to come within the exception must comply strictly with the words as well as the reason for the proviso. See, e. g. *Hartford Electric Light Co.* v. *Federal Power Commission*, 131 F. 2d 953, 962 (C. C. A. 2), certiorari denied, 319 U. S. 741; *Great Atlantic & Pacific Tea Co.* v. *Federal Trade Commission*, 106 F. 2d 667, 674 (C. C. A. 3), certiorari and rehearing for certiorari denied, 308 U. S. 625, 309 U. S. 694; *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. 2d 52, 56 (C. C. A. 8); *U. S.* v. *Dickson*, 40 U. S. 141, 165; *Canadian Pac. Ry. Co.* v. *U. S.*, 73 F. 2d 831, 834 (C. C. A. 9); *Rochester Telephone Corporation* v. *U. S.*, 23 F. Supp. 634, 636 (D. C. N. Y.), aff'd 307 U. S. 125; *Spokane & Inland R. R.* v. *U. S.*, 241 U. S. 344, 350; *Thomas Basham Co.* v. *Lucas*, 21 F. 2d 550, 551 (D. C. Ky.), aff'd 30 F. 2d 97 (C. C. A. 6). The limited scope and application of the proviso is clearly indicated by the Senate and House Reports on the bill before its enactment. Senate Rep. No. 573, 74th Cong., 1st Sess., pp. 11–12; H. Rep. No. 1147, 74th Cong., 1st Sess., pp. 19–20.

[29] To the same effect, H. Rep. No. 1147, 74th Cong., 1st Sess., pp. 19–20.

permit the making of a "traditional * * * closed-shop agreement" within the bounds of the basic policies of the Act (S. Rep., pp. 12, 13). The Board and the courts, therefore, have read the proviso, not in isolation, but in conjunction with the Act as a whole, and have held, indeed, that even employer discrimination which might appear to be protected by the letter of the proviso is not permissible where it would result in a denial to employees of the fundamental freedom to select representatives, and the protection against discrimination, which the Act as a whole was designed to afford. *Wallace Corporation* v. *N. L. R. B.,* 323 U. S. 248, 256; *Local 2880* v. *N. L. R. B.,* 158 F. 2d 365, 368–369 (C. C. A. 9), certiorari granted, 65 S. Ct. 1305; *N. L. R. B.* v. *American White Cross Laboratories, Inc.,* 160 F. 2d 75 (C. C. A. 2). In the instant case, where even the *letter* of the proviso was not satisfied (*supra,* pp. 24–30), it follows *a fortiori* that respondent can find no protection in the proviso for the discrimination in which it has engaged .

2. *The parties did not treat the Master Agreement as a closed-shop contract*

In view of the considerations discussed immediately above, it clearly would be against everything the Act stands for to strain the terms of the Agreement and the conduct of the parties thereto, in order to wring out a construction which would excuse the discrimination worked upon respondent's employees. But that is precisely what respondent and the A. F. L. seek to do. For their real contention is that, even if the Master Agreement was not a closed-shop agreement,

on its face, the parties treated it as such and, therefore, respondent's discriminatory action is protected by the proviso to Section 8 (3) of the Act (R. 550, 554). This contention is wholly without merit. In the first place, as the Board found (R. 36–37, 95–98), the parties did not treat the Master Agreement as a closed-shop contract and, in the second place, even if they had done so, their conduct could not alter the effect of the unambiguous written terms of the Agreement so as to bring it within the protection of the proviso.

The record herein shows beyond dispute that, as the Board found (R. 34, 36–37, 95–98), the Master Agreement was not, either by mutual consent or custom, regarded by the parties as requiring membership in good standing in the local union as a condition of employment. Nor is the basis for this finding offset by evidence that Assistant Superintendent Gallardo had, at the instance of the A. F. L., from time to time between 1941 and 1944, informed employees that they could not work at the Hume plant unless they had clearances from that union and that such employees either did not report for work again or obtained clearances (R. 472–474). Wesley King, business agent for Local 22382 during 1943 and 1944 (R. 520–522), could recall only two instances of an employee having been dismissed at the behest of the A. F. L., and in those cases the workers involved were *new* employees who were discharged, in strict compliance with the specific provisions of the Master Agreement (R. 618, 622), because they failed to complete their applications for membership in the A. F. L.

within 10 days of their initial employment (R. 520–523). And according to R. M. Tomson, for several years secretary-treasurer and business manager for the A. F. L. local at the Hume plant, only when the A. F. L. thought it could "get away with it" was a claim put forward that the Master Agreement was a closed-shop contract (R. 96; 300). He admitted, moreover, that the A. F. L. had sought a closed-shop contract from the C. P. & G. "every year," but that the cannery association would never grant it this concession (R. 96; 301–302, 311–312).

As we have seen (*supra,* p. 10), in November 1945, when the A. F. L. demanded that respondent give the Master Agreement the force and effect of a closed-shop contract by compelling employees who were on the seniority list to become members of the A. F. L., President Hume requested advice from the C. P. & G. and was told that the union demand was beyond the scope of the contract (*supra,* p. 10). It is undisputed that subsequent to the receipt of this advice respondent steadfastly refused to yield to any of the A. F. L.'s demands that it dismiss delinquent members, until several weeks later when respondent effected the discharges involved in this case (*supra,* p. 11).

It is likewise clear that the C. P. & G. did not regard the Master Agreement as a closed-shop agreement. We have already seen how it opposed such an interpretation in the fall of 1945 (*supra,* pp. 10–11). And it maintained this position consistently, for early in 1946, when the A. F. L. again attempted to "get away with" the claim that the Master Agreement provided for a closed shop, the determined opposition of the

respondent and the C. P. &. G. to this interpretation resulted in an exhaustion of the grievance procedure set up by the Agreement for the settlement of disputes relating to construction of its terms (*supra,* pp. 15–17).

Moreover, after having yielded to the A. F. L. in making the discharges here involved, respondent reasserted its original position. Thus, in contrast with the A. F. L. claim that the Master Agreement imposed the requirement that respondent discharge employees who failed to maintain membership in the A. F. L., counsel for respondent subsequently stated before the Board that the language of the Agreement contained no such requirement (*supra,* pp. 29–30). And in February 1946, before the Central Adjustment Board, respondent's counsel stated that the discussions between respondent and the A. F. L. over Section 3 (a) of the Agreement (the preferential hiring section) had resulted "in no common agreement between union and employer representatives concerning [its interpretation]" (R. 449). Also, in February 1946, respondent, reversing the position it had taken when it discharged employees in November and December 1945, because they had not maintained membership in the A. F. L. rehired several of these employees, despite the fact that they had paid no dues to the A. F. L. since June 1945, and were not members in good standing (*supra,* pp. 15–16).

It is further significant that when the Master Agreement was amended in writing on three separate occasions (R. 615, 408), no change whatever was made in Section 3 (a) which deals with union mem-

bership requirements (R. 409–410, 617). Certainly, it may be assumed that if the parties had really been in agreement on the matter of maintaining a closed-shop, they would have embodied such agreement in the terms of their written contract itself at the first available opportunity, particularly since respondent concededly did not consider that the language of the Master Agrement provided for a closed-shop (*supra,* pp. 29–30). The conclusion is inescapable that the reason neither the Master Agreement nor the amendments thereto, included a closed-shop provision is that the parties, in fact, never reached an accord on this issue. That respondent and the A. F. L. understood the appropriate terminology to express an agreement to a closed-shop may be taken for granted. But, in any event, such understanding was clearly demonstrated by the parties when, on March 25, 1946, after having finally agreed to enter into a true closed-shop contract, they executed an agreement which stated that "It shall be a condition of employment with the employer that all employees covered by this agreement shall become and remain members of the Union in good standing", and further, that "Persons who fail to maintain good standing in Union * * * shall be discharged within thirty-six (36) hours after the company is so notified by the Union" (R. 219–220).[30]

[30] From what has been said above, it is apparent that the check-off arrangement effected by amendment of the Master Agreement in June 1945 (R. 408–420), was in no sense an agreement for a closed-shop. It provided for nothing more than voluntary check-offs revocable at the will of each individual employee (R. 410). This amendment superseded the earlier check-off agreement entered into between respondent and the A. F. L. in August 1944 (R. 408, 410, 216–218). That agreement provided for compulsory

From this record of continuing *disagreement* between respondent and the A. F. L. as to whether respondent was required, under the Master Agreement, to maintain a closed-shop, the parties now seek to construct an *agreement*. But nothing is clearer, we submit, than the fact that they have failed in their undertaking, and that respondent has failed to sustain its "burden of proof of a closed-shop agreement".[31] The truth is, as the Board found, that the Master Agreement was not "either by mutual consent or custom, regarded by the parties as one requiring membership in good standing in the local union as a condition of employment" (R. 98), that the A. F. L. pressed for a closed-shop construction only when it thought it could "get away with it" (R. 96), and that respondent effected the discriminatory discharges herein, not in accordance with its understanding of the requirements of the Master Agreement, but in surrender to the threat of economic retaliation by the A. F. L. (R. 88, 89, supra, pp. 11–12).[32] The fact is that

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check-off against *members* of the union, but contained no provision for compulsory membership in the union (R. 216–218). In any event, its provisions are immaterial since it was no longer in effect at the time of the discriminatory discharges herein, which occurred in November and December 1945 (*supra*, pp. 10–15).

[31] *N. L. R. B.* v. *Mason Mfg. Co.*, 126 F. 2d 810, 813 (C. C. A. 9).

[32] That threatened economic hardship may not excuse an employer from the consequences of his unfair labor practices is, of course, well settled. The Act "permits no immunity because the employer may think the exigencies of the moment require infractions of the statute." *N. L. R. B.* v. *Star Publishing Co.*, 97 F. 2d 465, 470 (C. C. A. 9); *McQuay-Norris Mfg. Co.* v. *N. L. R. B.*, 116 F. 2d 748, 752 (C. C. A. 7), certiorari denied, 313 U. S. 565; *N. L. R. B.* v. *Hudson Motor Car Co.*, 128 F. 2d 528, 532–533 (C. C. A. 6); *N. L. R. B.* v. *National Broadcasting Co., Inc.*, 150 F. 2d 895, 900 (C. C. A. 2).

the discharges were made, not in accordance with, but entirely outside of, the requirements of the Master Agreement.

3. The conduct of the contracting parties could not bring the Master Agreement within the ambit of the proviso to Section 8 (3) of the Act

In view of its unmistakably clear terms, the requirements of the Master Agreement may not be explained away or altered by reference to the conduct of the parties following its execution. It is elementary that, "if the meaning of the contract is plain, the acts of the parties cannot prove an interpretation contrary to the plain meaning" (3 Williston, *Contracts,* Rev. Ed., Sec. 623, pp. 1793–1794. *South Atlantic Steamship Co.* v. *N. L. R. B.,* 116 F. 2d 480, 482 (C. C. A. 5), certiorari denied, 313 U. S. 582), and that "The fact that the parties followed a different plan cannot work a revocation of the plain agreement" (*In re Chicago & E. I. Ry. Co.,* 94 F. 2d 296, 299 (C. C. A. 7)). *Railroad Co.* v. *Trimble,* 77 U. S. 367, 377; *Dant & Russel, Inc.* v. *Grays Harbor Exportation Co.,* 106 F. 2d 911, 912 (C. C. A. 9); *Lesamis et al.* v. *Greenberg,* 225 F. 449, 451–452 (C. C. A. 9); *Alaska Treadwell Gold Mining Co., et al.* v. *Alaska Gastineau Mining Co.,* 214 Fed. 718, 727 (C. C. A. 9), modified as to another point, 221 Fed. 1019 (C. C. A. 9), certiorari denied 238 U. S. 614; *Hutchinson Gas & Fuel Co.* v. *Wichita National Gas Co.,* 267 Fed. 35, 46 (C. C. A. 8).

Nor does the fact that respondent upon occasion, may have acquiesced in the A. F. L.'s demand for the discharge of a delinquent member (*supra,* pp. 33–34) establish a contractual modification of the Master Agree-

ment. Evidence of such conduct proves only a voluntary concession which respondent was not obligated to continue. *In re Desnoyers' Shoe Co.,* 227 Fed. 16, 18 (C. C. A. 7). The fact "that the [respondent] has done more * * * than the letter of [its] obligation requires [cannot] be used to compel similar over-performance" of its obligation thereafter. *Liebeskind* v. *Mexican Light & Power Co.,* 116 F. 2d 971, 974 (C. C. A. 2).

Finally, the contention that, even though the terms of the Master Agreement did not condition employment by respondent upon A. F. L. membership, the discrimination exercised by respondent against its employees herein is protected by the proviso to Section 8 (3) of the Act, because the parties to the Agreement *treated it* as if it conditioned employment upon A. F. L. membership, leads to a circular argument which is invalid on its face. The argument is, in short, that since the parties were operating under the Master Agreement, and since respondent, in accordance with the request of the A. F. L., discharged employees who had been suspended from the union for non-payment of dues, the parties acted as they would have acted had the Master Agreement been a closed-shop contract, and the Agreement therefore, insofar as the parties were concerned, *was* a closed-shop contract.

The obvious fallacy in this argument is that respondent seeks to use the very conduct which constituted its violation of the Act, as an excuse for escaping responsibility for the violation. Acceptance of this argument would convert the proviso to Section 8 (3)

into a device which would permit an employer, acting together with the union representing his employees, to suspend at will the protection of Section 8 (3) so far as his employees are concerned. If the employer can point to the discrimination itself as justification for his action, the proviso to Section 8 (3) is reduced to an absurdity. Clearly the proviso was not designed to furnish any such loophole through which the protection afforded employees by Section 8 (3) might be so readily circumvented. See cases cited, *supra,* p. 31; see also, *Matter of Pittsburgh Plate Glass Co.,* 66 N. L. R. B. 1083, 1093–1095; *Matter of Iron Fireman Manufacturing Co.,* 69 N. L. R. B. 19, 20–21.

4. The other contentions of respondent and the A. F. L. are without merit

In its Supplemental Decision in the *Bercut-Richards* case (*supra,* p. 20) the Board, referring to the Master Agreement, stated that (R. 606):

> * * * No legal effect may be given the closed-shop provision contained in the current collective agreement after their expiration date * * *.

From this the A. F. L. argues that the Board, prior to its decision in the instant case, had already determined that the Master Agreement was a closed-shop contract and was foreclosed from re-examining the nature of the Agreement in the instant case (R. 553–554).

The contention is entirely without merit. The *Bercut-Richards* case, unlike the instant case, did not involve an unfair labor practice, but was a representation proceeding under Section 9 of

the Act. The only issue before the Board in that case was whether the objections to the elections held by the Board were valid and warranted an order setting the elections aside (R. 595–614). The case involved no question as to whether or not the Master Agreement was a closed-shop contract and the Board had no occasion to pass upon, or to weigh fully the considerations, determinative of that question (*ibid.*). It is specious, therefore, to argue that the Board's passing reference to a "closed-shop provision" in the Agreement represented a commitment by the Board or a prejudgment of that question, should it ever arise, as it has now, in a subsequent unfair labor practice proceeding. Actually the statement in the *Bercut-Richards* decision was merely part of an admonition to the employers there involved that, while the representation question in that case was pending before the Board, they should avoid any acts of recognition or assistance to any labor organization (R. 605–607). The Board's use of the phrase "closed-shop provision" was clearly nothing more than a broad non-technical reference to the union-membership provisions in the preferential hiring section of the Master Agreement. As the Board observed in its decision herein (R. 94–95), the parties in the *Bercut-Richards* proceeding had similarly used the term "closed-shop" to describe contractual membership requirements generally. Moreover, since the discharges were made prior to issuance of the *Bercut-Richards* decision (*supra,* pp. 18–20), respondent could not have relied upon the Board's statement therein, or have been misled by it.

Nor is there merit to the contention urged before the Board by both respondent and the A. F. L. (R. 205–206, 555, 622–626), that the grievance procedure set up by the Master Agreement foreclosed the Board from assuming jurisdiction over the controversy involving these discharges. In addition to the fact that the question concerning these discharges never came before the Central Adjustment Board on the merits of the discharges but only on the question of whether respondent might rehire the dischargees without requiring clearance from the A. F. L. (*supra,* pp. 15–17; R. 445–446),[33] there is no valid basis for any such attack on the Board's jurisdiction in the instant case. Section 10 of the Act gives the Board exclusive power to determine what constitutes an unfair labor practice and provides that this power "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law or otherwise" (49 Stat. 449, 29 U. S. C. Sec. 160 (a)). In the face of this direct Congressional mandate it is now too well settled for extensive argument that a private agreement to which the Board is not a party cannot operate to deprive the Board of its function under the Act. *N. L. R. B.* v. *Walt Disney Productions,* 146 F. 2d 44, 46–48 (C. C. A. 9), certiorari denied, 324 U. S. 877; *N. L. R. B.* v. *Poultrymen's Service Corp.,* 138 F. 2d 204, 210–211 (C. C. A.

[33] It is to be noted, moreover, that at the time the Board issued its complaint herein, the arbitration machinery had broken down, as the Board observed (R. 91–92). The individual whom the parties had designated as arbitrator had declined to serve (*supra,* p. 17).

3); *N. L. R. B.* v. *Federal Engineering Co.,* 153 F. 2d 233, 234 (C. C. A. 6); *N. L. R. B.* v. *Prettyman,* 117 F. 2d 786, 792 (C. C. A. 6); cf. *May Department Stores Co.* v. *N. L. R. B.,* 326 U. S. 376, 392; *Wallace Corp.* v. *N. L. R. B.,* 323 U. S. 248, 253–255.

Point II

The Board properly concluded that respondent violated Section 8 (1) of the Act

A. Respondent violated Section 8 (1) of the Act by rendering assistance to the A. F. L.

The Board found (R. 34, 111) that respondent violated Section 8 (1) of the Act by urging its employees to become and remain members in good standing in the A. F. L. (*supra,* pp. 7–10), by granting access to its cannery after March 1, 1946, to representatives of the A. F. L. while denying like privileges to representatives of the C. I. O. (*supra,* p. 21), and by requiring, as a condition of employment, that employees on the seniority list obtain new clearance slips from the A. F. L. (*supra,* pp. 8–10). In the absence of a valid closed-shop contract, as was the case here (*supra,* pp. 23–44), there is no question but that such conduct by an employer constitutes interference, restraint, and coercion within the meaning of Section 7, and in violation of Section 8 (1) of the Act. *N. L. R. B.* v. *Electric Vacuum Cleaner Co.,* 315 U. S. 685, 693, 695; *N. L. R. B.* v. *Link-Belt Co.,* 311 U. S. 584, 601; *Int'l Ass'n of Machinists* v. *N. L. R. B.,* 311 U. S. 72, 78, 80; *N. L. R. B.* v. *Waterman Steamship Corp.,* 309 U. S. 206, 224–226; *N. L. R. B.* v. *Cowell Portland Cement Co.,*

148 F. 2d 237, 242–243 (C. C. A. 9); *South Atlantic Steamship Co.* v. *N. L. R. B.,* 116 F. 2d 480, 482–483 (C. C. A. 5), certiorari denied, 313 U. S. 582; *N. L. R. B.* v. *American Car and Foundry Co.,* 161 F. 2d 501, 503 (C. C. A. 7).

B. Execution of the closed-shop contract of March 25, 1946, constituted a violation of Section 8 (1) of the Act

The Board found that respondent, by conferring exclusive recognition upon the A. F. L. and by entering into a closed-shop contract with it, on March 25, 1946, while a representation question affecting respondent's employees was pending before the Board, interfered with its employees' exercise of their freedom of choice of representatives, in violation of Section 8 (1) of the Act (R. 34–35, 98–111). The legal considerations involved in this phase of the case are, as the Board noted (R. 35), identical with those involved in *Matter of Flotill Products, Inc.,* 70 N. L. R. B. 119. Since the latter case is now pending argument before this Court as *N. L. R. B.* v. *Flotill Products, Inc.,* No. 11,449, we respectfully refer the Court to the Board's brief therein (pp. 8–31) for a discussion of the validity of the Board's finding described above.[34]

[34] The Board's brief in the *Flotill Products* case is now on file with the Clerk of the Court, and the Board will serve the parties herein with copies of the *Flotill Products* brief at the same time the instant brief is served.

CONCLUSION

It is respectfully submitted that the Board's findings are supported by substantial evidence, that its order is valid,[35] and that a decree should issue enforcing the order in full.

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[35] Since the respondent failed to challenge the validity of the order before the Board, the propriety of the order is not now open to review. *N. L. R. B.* v. *Cheney California Lumber Co.*, 327 U. S. 385; *N. L. R. B.* v. *Kinner Motors, Inc.*, 154 F. 2d 1007 (C. C. A. 9); *N. L. R. B.* v. *Van de Kamp's Holland Dutch Bakeries*, 154 F. 2d 828 (C. C. A. 9). In any event, the validity of the order (R. 38–45) on the findings made is well established. *N. L. R. B.* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265; *Phelps-Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 187–189, 197; *Int'l Ass'n Machinists* v. *N. L. R. B.*, 311 U. S. 72, 75, 81–83.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are as follows:

FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

SEC. 2. When used in this Act—

(6) The term "commerce" means trade, traffic, transportation, or communication among the several states, or between the District of Columbia or any Territory of the United States or any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through

from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order. * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinbefore provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

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